IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 303 of 2006
WITH
CIVIL APPLIATION NO.4448 OF 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOTIBHAI JESLABHAI GHARASIYA & 1 - Appellant(s)
Versus
NARANBHAI JESLABHAI GHARASIA - Respondent(s)

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Appearance :
MR JB PARDIWALA for Appellant(s) : 1 - 2.
MR DAKSHESH MEHTA for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 06/12/2006

ORAL JUDGMENT

1. ADMIT. Mr. Mehta waives service of notice of admission on behalf of the sole respondent. With

the consent of the parties, the Appeal from Order is disposed of today.

2. The appellants herein are the original defendants against whom the present respondent had instituted a suit for declaration and injunction on the ground that the plaintiff and defendants are step brothers.

3. The plaintiff's mother was one Harkhiben, who had married with one Mangabhai, and out of the said wedlock, she delivered three children. After the death of the said Mangabhai, Harkhiben re-married with Jeslabhai, and the plaintiff is the son of Jeslabhai and Harkhiben. After death of the plaintiff's mother, his father Jeslabhai remarried with one Pisliben. The case of the plaintiff is that he is in possession of the suit property and the land in question belongs to Mangabhai who is previous husband of his mother Harkhiben, and that his father used to stay with his mother in the house of his mother as Ghar Jamai. It is the case of the plaintiff that the plaintiff has share in the suit property through his mother's side. On this and

other grounds, the aforesaid suit for declaration and injunction is filed. The said suit was resisted by the defendants on various grounds.

4. The trial Court decreed the said suit of the plaintiff against which the appellants herein preferred an appeal being Regular Civil Appeal No.72 of 2001, wherein the learned appellate Judge has passed the following order.

"1. The matter is remanded back to the Trial Court. I have already framed issues.

2. The learned Trial Court is directed to issue notices to concerned parties and give opportunity to both the parties to lead evidence on the above issues and to dispose of the matter as early as possible within 6 months from today.

3. Copy of this Judgment be sent to Registrar, Chikhli Court so that in future the Registrar (COC) should take care that at the time of filing of the suit if Caste Certificate is produced then he should not entertain the suit and this mistake should not be committed again in future.

4. No order as to costs.

5. R & P to send to Lower Court as early as possible."

5. However, reading the said order it is not clear whether the lower appellate Judge has set aside the decree and sent the matter back or whether the matter is retained and some findings have been called for from the trial Court. In this connection reference is required to be made to Order 41 Rule 23 and other ancillary provisions of the Code of Civil Procedure. Order 41, Rule 23 and Rule 25 of the Code of Civil Procedure reads as under :

> **Order 41 Rule 23. Remand of case by Appellate Court-**Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit, and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the

trial after remand.

23-A Remand in other cases.- Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required ;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor (within such time as may be fixed by the Appellate Court or extended by it from time to time.)

6. It is not in dispute that the suit was not disposed of by the trial Court on the preliminary point. Therefore, the provisions of Order 41 Rule 23 of the Code of Civil Procedure (hereinafter referred to as “the Code”) is not applicable in the present case. Under the circumstances, it can be said that the learned Appellate Judge has passed the order either under Order 41 Rule 23-A or under Order 41 Rule 25 of the Code. However, so far as power under Order 41 Rule 23-A of the Code is concerned, the Appellate Court can remand a matter even if the trial Court has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary. However, reading the order of the Appellate Judge, it cannot be said that the learned Appellate Judge has exercised the powers under Order 41 Rule 23-A of the Code as the decree of the trial Court is not reversed by impugned order. Under the circumstances, it can be said that the learned Appellate Judge has passed the order by resorting to the provisions

of Order 41 Rule 25 of the Code as the learned Appellate Judge also prescribed time limit during which the trial Court is required to proceed with and try the issues which are framed by the learned Appellate Judge. As pointed out earlier, if it is a remand order passed under Order 41 Rule 23-A of the Code, the decree of the trial Court is required to be reversed in appeal which is not done in this case. Both the learned advocates have frankly submitted that there is no order passed by the Appellate Judge by which the decree of the trial Court is reversed by the Appellate Judge.

7. At this stage, learned advocate for the appellants has relied upon a decision of this Court in the case of *State of Gujarat vs. Sanubhai Matubhai and Ors.* reported in *1970 G.L.R. (11), page 613* wherein this Court has taken the view that the only power of remand that an Appellate Court has, is to be under the provisions of Order 41 Rule 23 and or Order 41 Rule 25 of the Code of Civil Procedure. Except these two provisions, there is no other inherent

power in the Appellate Court to remand the matter back to the trial Court.

8. So far as the above decision cited by the learned learned counsel for the appellants is concerned, it will not be applicable in the present case because after the aforesaid judgment, an amendment is made in the Code of Civil Procedure by inserting Order 41 Rule 23-A by which the Appellate Court has got powers of remand even if the trial Court has disposed of the suit otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary. The aforesaid Order 41 Rule 23-A inserted by the Code of Civil Procedure (Amendment) Act, 1976 which came into force with effect from 1-2-1977.

9. In view of insertion of Rule 23-A in Order 41 of the Code, the Appellate Court can even remand a matter if in its opinion re-trial is necessary. In that view of the matter, the decision cited by the learned counsel for the appellants as referred to above has no application in view of the amendment made in C.P.C. It is however,

required to be noted that since the Appellate Court has not reversed the decree of the trial Court, it can be presumed that the Appellate Court has exercised its powers under Order 41 Rule 25 of the Code.

10. In view of the aforesaid discussion, the appeal is partly allowed by holding that the lower Appellate Court shall retain Regular Civil Appeal No.72 of 2001 on its file and the trial Court is directed to send findings on the issues as referred by the learned Appellate Judge and such findings may be sent to the Appellate Judge and thereafter, the learned Appellate Judge shall dispose of Regular Civil Appeal No.72 of 2001 on its own merits. It is further hold that Regular Civil Appeal No.72 of 2001 be treated as pending before the learned Appellate Judge by treating the aforesaid order passed by the learned Appellate Judge under Order 41 Rule 25 of the Code.

11. It is pointed out by both the learned advocates that at the time of admitting the appeal,the decree of the trial Court was stayed by the

Appellate Judge. In that view of the matter and in view of the consent given by the learned advocates appearing for both the sides, till the Regular Civil Appeal No.72 of 2001 is finally disposed of by the Appellate Court, the decree passed by the trial Court in Regular Civil Suit No.56 of 1993 shall remained stayed.

12. The appeal is accordingly partly allowed. No order as to costs.

13. No order on Civil Application No.4448 of 2006.

(P.B.MAJMUDAR,J.)

*mithabhai